

STATE OF NORTH CAROLINA
COUNTY OF CATAWBA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
07 EDC 1382

Student by and through her parents,
Father and
Mother,

Petitioners,

FINAL DECISION

v.

CATAWBA COUNTY SCHOOLS
BOARD OF EDUCATION
Respondent.

THE ABOVE-ENTITLED MATTER was heard before the undersigned Administrative Law Judge Donald W. Overby on November 6, 7, and 8, 2007 in Newton, North Carolina and on December 3, 2007 in Morganton, North Carolina.

APPEARANCES

For Petitioner: Kristine L. Sullivan and Iris Green
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Attorney for Petitioners

For Respondent: Donna R. Rascoe
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EXHIBITS

Petitioner's Exhibits admitted into evidence: Nos. P-1 through P-31.

Respondent's Exhibit's admitted into evidence: Nos. 1-5, 8, 11-14, 18-21, 25, 27, 28, 30, 31, 33-39, 41-43, 45, 47-50.

ISSUE

Whether Respondent offered *Student* a free appropriate public education in the least restrictive environment?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From official documents in the file, sworn testimony of the witnesses, and other competent and admissible evidence, it is found as a fact that:

FINDINGS OF FACT

1. Petitioners *Father* and *Mother* are residents of Catawba County, North Carolina, and are the parents of *Student* (hereinafter "*Student*"). *Student's* date of birth is ***, 1993 and, at the time of the contested hearing, she was 14 years old.
2. Although premature, *Student* was healthy when she was born. At approximately two weeks of age, *Student* became ill with encephalitis. As a result of the encephalitis, *Student* developed multiple disabilities. She has diagnoses of cerebral palsy, cortical blindness, seizure disorder, and mental retardation.
3. *Student* is also diagnosed with spastic quadriplegic cerebral palsy, which causes abnormal muscle tone in all of her extremities and, at times, low tone in her postural muscles. *Student* can move, however, her muscle tone influences her ability to move against gravity and through various positions.
4. Cerebral palsy impacts *Student's* education in several ways. It affects her ability to speak. She is unable to explore her environment through movement. *Student* has difficulty moving from a sitting position to standing, and has difficulty balancing once she is standing. She needs the assistance of one person, sometimes two, to stand upright.
5. *Student* is diagnosed with cortical visual impairment. Her eyes are anatomically correct; there is damage to the brain which results in difficulty processing information. Evaluations have shown that *Student* does not seem to indicate a preference for one color over another. Cortical visual impairment impacts *Student's* education in several ways. Her vision abilities are inconsistent, and she is generally unable to explore her environment through vision. *Student* needs to have information presented to her in another way, such as through tactile or auditory input. *Student* uses audition more than her vision. Additionally, *Student* needs to be approached slowly and told that she is going to be touched or moved.
6. *Student* has a seizure disorder. She takes seizure medication and has a vagus nerve stimulator, or VNS. A VNS is a device, similar to a pacemaker, which is implanted on the left side of the chest. The positive results from use of the VNS have allowed *Student's* seizure medication to be cut nearly in half.

7. The seizure disorder impacts *Student's* education. She sometimes needs to be comforted after having a seizure. *Student* sometimes needs to sleep after having a seizure. *Student* also needs extra sleep to recover from seizures at night and the seizure medications. She arrives at school thirty minutes after it has started in order to allow for this extra sleep.
8. *Student* is diagnosed with mental retardation. Some evaluations have characterized this as mild to moderate, while others characterize it as severe mental retardation. The mental retardation effects *Student's* education. At least one educational evaluation noted that it is unclear if *Student* is unable to do an activity or chooses not to do it.
9. *Student* has splinter skills, meaning that she functions at a different developmental level in different skill areas.
10. *Student* has sensory integration deficits and needs. *Student* is unable to process some sensory input, and processes other information differently. *Student's* sensory needs impact her education. Although *Student's* audition is her strength, other senses are areas of need. Loud noises, excessive movement, and excessive touch on her body can sometimes overwhelm *Student*. She responds well to some other sounds, movements, and textures. *Student* can withdraw or be afraid of her environment, as the sensory deficits affect her ability to understand her location in space. She accepts hand-over-hand guidance, and is more successful with familiar objects and toys. *Student* has demonstrated a clear dislike for oral stimulation.
11. In August of 1996, *Student* was found to be eligible for special education services in the category of multihandicapped. An evaluation done at that time found *Student* to have significant developmental delays and special education services were needed in the areas of speech-language, motor, cognition, and adaptive behavior.
12. The NC Department of Environment, Health, and Natural Resources Division of Maternal and Child Health completed the developmental evaluation of *Student* in August 1996. *Student* was referred for this evaluation by Becky Smith with Early Childhood Intervention Services which had been providing services to *Student* prior to preschool. *Student* had been previously diagnosed as having a combination of central visual deficit, small stature, well-controlled seizures, global developmental delay, and a motor pattern best described as spastic quadriplegic cerebral palsy.
13. *Student* is identified as multi-handicapped based upon her cognitive deficits, cortical blindness, spastic quadriplegia communication, and sensory deficits. *Student* first qualified for special education services under the Individuals with Disabilities Education Act [hereinafter "IDEA"] on August 1, 1996. She qualified for Physical Therapy, Occupational Therapy, Vision Therapy and Speech Therapy as related services.
14. Catawba County Schools provides a number of different placements for students with disabilities. These include placement in the regular classroom with some special education support, resource services, separate classrooms, the public separate school, and hospital homebound. The school district has also sought out residential placements outside the county when a student has needed this.

15. When *Student* was ready to begin first grade, the Individualized Education Program [hereinafter “IEP”] Team discussed placement in either Startown Elementary, in the Catawba County School system (hereinafter CCS), or in Conover, in the Newton-Conover City School system. *Mother*, petitioner’s mother, stated that CCS believed Conover would be a better placement for *Student*, and the *Parents* agreed to this placement.

16. *Student* was enrolled at Conover School from 1996 through 2000 when she was in preschool through 2nd grade. Conover School is a public separate school which serves students with moderate to severe disabilities. It is located in the Newton-Conover City School District, but is the result of a collaborative effort between the three school systems in Catawba County, Newton-Conover City Schools, Hickory Public Schools and Catawba County Schools. There are sixteen classrooms in Conover: three are pre-school classes, five are elementary, four are middle school, and four are high school. The only classrooms with non-disabled children are at the pre-school level.

17. During her first year in preschool at Conover, *Student* worked on IEP goals and objectives involving using signs to communicate, using communication devices, feeding herself finger foods, drinking from a cup, tolerating different textures, and some gross motor tasks directed toward helping her to stand and increasing trunk control. *Father and Mother* do not feel satisfactory progress was made during *Student*’s time at Conover.

18. *Student* was enrolled at O. Elementary School for the 2001-02 school year (in 2nd grade) through the 2006-07 school year (in 6th grade). During this time, she was served in what is referred to in the Catawba County Schools as a “cluster classroom.” A cluster classroom has a group of students whose skills cluster at around the same range. The students are able to communicate with each other, gain from each others strengths and weaknesses and thereby learn from one another. *Father and Mother* feel *Student* made progress during her time at O..

19. In March 2004, an Educational Evaluation was completed for *Student*. This evaluation found that *Student* had a developmental age of nine months. It was the opinion of individuals working with *Student* at that time that her actual developmental age was likely higher than nine months.

20. On November 14, 2005 the IEP team held a meeting to conduct an annual review of *Student*’s IEP and to make a reevaluation determination.

21. For the 2004-05, 2005-06 school years, *Student* was in a resource placement in the cluster classroom at O. Elementary. She received PT, OT, speech, vision and transportation as related services.

22. For the 2006-07 school year, *Student*’s placement was changed from resource to separate so that she began spending more time in the cluster class and less time with non disabled peers.

23. On March 8, 2007, the IEP team held a meeting to review *Student*’s IEP and to discuss placement. The meeting was facilitated by a representative from the North Carolina Department of Public Instruction. Placement was discussed at this meeting because *Student* was preparing to transition to middle school for the 2007-08 school year. This transition had been delayed for a

year because of the parents' opposition to considering Conover School as a middle school placement the previous year.

24. The discussion at the March 8, 2007 IEP meeting included a review of *Student's* IEP and consideration of Conover School and *J.F. Middle School* (hereinafter "JFMS") as possible middle school placements for *Student*. *Father* and *Mother* were in favor of and proposed the placement in the separate setting in the cluster classroom at JFMS. JFMS is a regular middle school which has a cluster classroom, but it does not provide a similar structure and types of activities as the cluster class at *O.* The parties were not able to reach a consensus at this meeting. There was discussion about holding another meeting or requesting mediation, but no clear plan was developed.

25. Following the March 8, 2007 IEP meeting, the school district's Exceptional Children Director, *Ms. F.W.*, met with the parents and the parents had the opportunity to visit Conover and JFMS. On April 2, 2007, *Ms. F.W.* met with *Father* and on May 23, 2007, she met with *Mother* to discuss the placement issue informally. No resolution was reached in these meetings with the parents and *Ms. F.W.* offered to reconvene the IEP team or proceed to mediation.

26. The parties eventually agreed to hold another IEP meeting and on July 19, 2007, the IEP team reconvened to continue its discussion of placement for *Student*. There were three persons who were not able to attend this meeting and who provided written input which was shared with the team. *Ms. J.W.* (Conover principal), *Ms. R.H.* (*O.* principal) and *Ms. L.T.* (JFMS principal) each provided written input regarding placement. Each person at the meeting was given the opportunity to share their input regarding the appropriate placement for *Student*.

27. *Father* and *Mother* advocated for *Student's* placement at JFMS emphasizing their desire that she be with non disabled peers. The parents stated that *Student* would benefit from socialization at JFMS including in settings outside the classroom such as music, art and lunch. *Father* testified that school officials stated that they would not compromise on the placement issue, but he acknowledged that the school officials discussed their consideration of JFMS during the IEP meeting.

28. School officials at the July 19 meeting proposed placement at Conover School and discussed the general differences between elementary school and middle school and the particular services available to *Student* at Conover. There was discussion of Conover providing a transdisciplinary approach where the entire school is trained to work with *Student* and where unique specialized needs can be met. There also was discussion about Conover having more flexibility in its schedule and routines and there being opportunities for socialization, including with non-disabled peers, and addressing communication needs that would not be available at JFMS.

29. No consensus was reached at the July 19 IEP meeting and *Ms. F.W.*, on behalf of the school district, stated that *Student's* placement would be at Conover. The parents indicated their disagreement with this decision and expressed their intent to request a due process hearing.

30. During *Student's* previous enrollment at Conover (between 1997 and 2000), *Mother*

volunteered in the classroom and attended field trips. *Mother* had concerns that *Student* did not receive adequate attention and stimulation at Conover and that she would bite herself and cry, particularly during the last two school years of her enrollment. *Mother* also was concerned that *Student* did not make progress during the time she attended Conover.

31. *Mother* acknowledged numerous notes she wrote to school officials at Conover during the 1999-2000 and 2000-01 school years in which she commented on *Student*'s progress and praised teachers for their work with *Student*. *Mother*'s notes included comments that *Student* was using her eyes a lot and all the stimulation was paying off; that *Student* was real attentive and happy; and that *Student* was being well instructed. In other notes, *Mother* thanked school officials for their hard work, for watching *Student* so closely and for the care they gave her.

32. *Mother* also spent time in *Student*'s cluster class at O. Elementary. *Mother* felt welcomed at O. and felt that she was a part of the school. *Mother* testified that *Student* made "nothing but progress" at O.. *Mother* testified that *Student* benefitted from socialization at O. because the other students helped her with things such as putting up her coat, pushing her in her wheelchair, and helping her with the pages during reading time. *Mother* did not observe *Student* socializing outside the cluster class.

33. *Mother* visited JFMS three times. *Mother* testified that it is her opinion that the cluster class at J.F.M.S. is an appropriate placement for *Student*. Her opinion was based upon knowledge of the teacher and her qualifications, a belief that the teacher can handle *Student*, and an understanding that classrooms can be modified.

34. *Mother* also relied upon a statement that she attributed to Ms. F.W. from the July 19, 2007 IEP meeting, that "no one said it couldn't be met at J.F.M.S.." *Mother* understood this sentence to mean that *Student* could be served at J.F.M.S.. However, *Mother* acknowledged that the IEP minutes show several statements by Ms. F.W. regarding J.F.M.S. and Conover and that these statements reflect that Ms. F.W. was looking at both sides of the issue.

35. *Father and Mother* have focused considerable attention on the concept that services could be provided at JFMS, and that is the least restrictive environment for *Student*. There is no question that the services could be provided at JFMS or at just about any site, "even a parking lot". The *Parents* have drawn an arbitrary and artificial distinction that ignores or minimizes the appropriateness of a particular site for provision of the services. Likewise, the *Parents* have drawn an arbitrary and artificial distinction that it is somehow improper for CCS to choose the "best" site, the "most" appropriate site for *Student*'s education, when the services could be provided in alternate locations. (Emphasis added)

36. *Father* is *Student*'s father. *Father* testified that *Student*'s health is about the same now as it was when she was attending Conover School. As a result of her overall health, she has a low resistance to things like common cold and viruses. She is probably more chronic than an average student, but overall she has a strong constitution and is resilient.

37. *Father* testified that *Student* likes to go out, to be around people and to experience different things, which is not entirely consistent with other evidence concerning how *Student*

interacts or reacts to her environment. *Father* testified that when *Student* was at Conover and when she was younger, she engaged in self-stimulating behaviors. He believed these behaviors occurred when her outside environment was not stimulating her enough. He also believed that *Student's* behavior at Conover was characterized by frustration and lack of stimulation.

38. *Father* testified that *Student's* progress has been relatively equal between Conover and *O.*, but she has shown less frustration at *O.*. Further, her rate of progress is not likely to change because of the nature of her disabilities and her illnesses.

39. *Father* testified that *Student* did not need a more restrictive setting than what she has experienced at *O.* Elementary School and that moving to Conover would be detrimental to her. *Father* believes that *Student* can be educated at JFMS in part because the services that she has been receiving at *O.* can happen in the classroom at JFMS. *Father and Mother* do not acknowledge the differences between JFMS and *O.* cluster classes and that they will still not be the same even if the modifications are made at JFMS.

40. *Ms. C.S.* is a former one-on-one worker for *Student* and testified on behalf of the Petitioners. *Ms. C.S.* is employed as a surgical technologist and a certified nursing assistant. *Ms. C.S.* began working with *Student* around 1998 and continues to provide some respite care in the Little home. In the home, *Ms. C.S.* helps *Student* with such tasks as bathing and dressing. *Ms. C.S.'s* training for working with *Student* consisted of a case manager talking with *Ms. C.S.* about *Student's* needs.

41. *Ms. C.S.* worked as *Student's* one-on-one at Conover School for one school year around 1998 or 1999. *Ms. C.S.'s* duties were to make sure that *Student's* personal needs were met and to ensure her safety. This was *Ms. C.S.'s* first experience working with a student with a disability. One of *Ms. C.S.'s* responsibilities was to redirect *Student's* self-stimulating behaviors. When *Student* began self-stimming, *Ms. C.S.* pulled *Student's* hand away and told her not to rub her nose and eventually, this behavior stopped.

42. Two of *Student's* most prevalent self-stimulating behaviors are biting and "swiping" her face, at times in the past to the point of rubbing her face raw. *Mother* testified that *Student* continues to do these behaviors if she has had a bowel movement or is otherwise uncomfortable, and that it is the only way *Student* knows to communicate that she feels something is wrong.

43. *Ms. C.S.* testified that nobody was paying *Student* any attention at Conover so she took it upon herself to start talking to *Student*. *Ms. C.S.* acknowledged that *Student* did participate in group activities in the classroom and received speech therapy and physical therapy. *Ms. C.S.* worked on some goals with *Student* based on what she was told to do by her agency, including such tasks as eating, drinking and using a gait trainer.

44. *Ms. C.S.* testified that she and *Student* are friends. *Ms. C.S.* became involved in this case to advocate for *Student* and *Mother's* position that *Student* should be at JFMS. *Ms. C.S.* thinks that it is *Student's* "right" to go to the school that she chooses and that *Student's* parents should be allowed to make that choice since *Student* is incapable. Her only basis for preferring JFMS is that it is a matter of "right." *Ms. C.S.* has never been to JFMS. *Ms. C.S.* has not reviewed any of

Student's IEPs nor has she been involved in any of *Student's* IEP meetings. Ms. C.S. has not observed *Student* in a classroom setting since 1998 or 1999 other than a couple of visits to O..

45. Dr. Susan Pogoloff testified as an expert for the Petitioners. Dr. Pogoloff holds undergraduate and graduate degrees in special education. She has a doctorate from the University of Wisconsin in special education. Dr. Pogoloff is an associate professor of special education at Appalachian State University in Boone, North Carolina. She teaches undergraduate and graduate courses in special education. Dr. Pogoloff taught mentally handicapped students for three and a half years in Oklahoma. She also worked for three and a half years providing transitional services to teenagers and adults with disabilities.

46. Dr. Pogoloff reviewed *Student's* education records from 2004 to the present. She observed *Student* at O. Elementary and visited JFMS. She did not visit Conover School. Dr. Pogoloff concluded that *Student's* IEP goals can be met in the regular middle school environment and that this would be the least restrictive environment for her.

47. In developing her opinions, Dr. Pogoloff relied upon progress reports, an occupational therapy evaluation, physical therapy evaluation, educational evaluation, a functional vision assessment, and *Student's* IEPs for the 2004-05, 2005-06, and 2006-07 school years. Dr. Pogoloff opined that *Student* has made significant progress which has been more evident when she was in a natural environment or a naturally-occurring situation interacting with her peers.

48. After her school visits, Dr. Pogoloff concluded that she did not see anything in *Student's* IEP that had to be implemented at a separate school. She further opined that everything in *Student's* IEP is portable and can go to almost any environment. Ultimately, Dr. Pogoloff testified that it was her opinion that *Student's* IEP could be implemented in a regular education classroom at JFMS.

49. Dr. Pogoloff contended that *Student* could participate in various regular education activities at JFMS such as lunch and homeroom, but acknowledged that she did not observe either of these activities, did not know when they occurred during the daily schedule, or what happened during the homeroom period. Dr. Pogoloff had not reviewed the JFMS daily schedule and when shown a copy of the schedule, acknowledged that it is possible *Student* would not be able to participate in the homeroom period.

50. Dr. Pogoloff acknowledged that no valuable social interactions would happen for *Student* during the three minutes between classes on the JFMS schedule.

51. With regard to her consideration of the public separate school placement, Dr. Pogoloff acknowledged that she has never referred a student to a public separate school and she has never worked with, consulted with nor given any advice about a student for whom a public separate school was appropriate. In fact, she has never known a student nor could she imagine a student for whom a public separate school would be appropriate. Her position in this regard completely ignores and obviates a placement on the continuum as mandated by law for consideration.

52. Ms. M.W. was *Student's* teacher at O. Elementary from 2002 through the date of this

hearing. *Ms. M.W.* holds an undergraduate degree in elementary education and a graduate degree in special education (severe and profound cognitive delays). She is licensed in regular education (Kindergarten – 6th grade), mild to moderate disabilities (Kindergarten – 6th grade) and severe and profound disabilities (Kindergarten – 12th grade).

53. *Ms. M.W.* was the leader of *Student's* IEP team and was involved in the development and implementation of *Student's* IEPs. Overall, *Student* made some progress on her goals and objectives for each of the past three school years. However, her progress has been very slow and has not yielded significant improvement since *Ms. M.W.* began working with *Student* in 2002. Sometimes, *Student's* progress was affected by her health and related absences although she demonstrated some ability to regain skills after such absences.

54. *Student* has made very slow progress in the area of feeding. *Ms. M.W.* was working on finger feeding when she first began with *Student*, but these efforts were not successful. *Student* will not pick up foods, but if presented with finger foods, she will raise them to her mouth. When *Student* eats in *Ms. M.W.'s* classroom, teachers or assistants help her and use adaptive utensils. They scoop food into a spoon and then hand it to *Student*. They provide hand-over-hand assistance where the teacher holds *Student's* hand and then helps guide the spoon to *Student's* mouth. They provide partial physical assistance such as holding the bottom of a cup to help *Student* guide the cup to her mouth. At times, *Student* can bring a cup to her mouth and put it back down independently.

55. In *Ms. M.W.'s* class, *Student* has worked on using switches. Initially, *Student* would throw switches or any item placed near her or she would beat on switches repeatedly with no meaning. She has progressed to the point that she can use on-off switches independently. She will allow her hand to remain on a contact reactive switch with the physical assistance of the teacher.

56. *Student* does not usually generalize skills to different settings or activities. For example, *Ms. M.W.* testified that *Student* does some signing in the classroom, but does not use these same signs when she is in the cafeteria. Although *Student* can use both hands to pick up and manipulate her cup and a toy (the rocket switch), she does not use these skills with any other items.

57. During her years at *O. Elementary*, *Student* was taken to regular education classes for some classes including PE, Art, Music and Drama when her health allowed. *Student's* participation in these classes depended entirely upon the teacher or teacher assistant who took her to the class. In these settings, the adult with *Student* had to engage *Student* through verbal or verbal and physical assistance.

58. *Student* has limited interactions with other students in her class and in the school. She does not usually initiate interactions with others, although she will vocalize to get the attention of a familiar person. *Student* has difficulty interacting (verbally or nonverbally) with even non disabled peers whose language skills are significantly greater than hers. She did develop a friendship with one other disabled student in her class after several years of work by *Ms. M.W.* to pair *Student* and the other students as they worked on each others goals.

59. Ms. M.W. testified that she considered JFMS and Conover as possible placements for *Student*. She considered her observations of and information about both schools, information about the experiences of other children at those schools, and her observations of *Student* at a spring-fling event at Conover. She also considered that the classroom at Conover was similar to *Student's* classroom at O. and that the pace was slow. She concluded that based upon her work with *Student* and her training and experience in special education, that the appropriate placement for *Student* for the 2007-08 school year would be Conover School.

60. Ms. M.W. testified that it would be difficult for *Student* to meet her IEP goals and objectives at JFMS and that she would receive little to no educational benefit by being in that environment. Ms. M.W. described that *Student* would be praised at O. for laughing, bubbling and making her happy sounds. At JFMS, this behavior would be considered an intrusion and would be a disruption.

61. Ms. E.F. has been *Student's* Occupational Therapist since 2000. She holds a bachelors degree in Occupational Therapy (hereinafter "OT") and has state and national certification as an OT. Ms. E.F. is also certified in the area of sensory integration. Ms. E.F. has worked at Conover, O. and JFMS. Ms. E.F. was a member of *Student's* IEP team and was involved in the development and implementation of *Student's* IEPs. *Student's* response to work on OT goals and objectives has been inconsistent. She has made some progress on some objectives, but continues to work on such skills as manipulating toys with both hands, touching and grasping objects, and using switches.

62. In working with *Student*, Ms. E.F. has focused on feeding, strength and endurance, tolerating sensory input and helping *Student* explore her environment to facilitate learning. *Student* has made some progress in these areas. She is better able to grade her pressure to finger food, but still does not have in-hand manipulation skills. *Student* is able to independently bring her cup to her mouth and put it down. *Student* has worked on increasing her ability to weight-bear, but she has been inconsistent with this. *Student* has been working on most of these skills for seven years.

63. In terms of exploring her environment, *Student* is able to bring her arms in front of her and to mid-line to play with a toy. When Ms. E.F. began working with *Student*, *Student* would throw everything that was presented to her to try to hold and/or manipulate. *Student* has progressed to the point that she will allow her hands to rest on objects for a greater period of time. The primary motor pattern *Student* uses in exploring her environment is a raking motion which is not a developmentally typical response.

64. *Student* has sensory deficits which affect her ability to process what is going on around her. She tends to have adverse reactions to typical sounds and movements in the environment and to touch. At these times she may grimace, cry, scream, throw things, mouth her hand and bite her hand. *Student* also has some self-stimulating behaviors which are thought to be efforts by individuals to calm themselves or organize themselves. *Student's* self-stimulating behaviors include hand-mouthing and biting which she has demonstrated during the 2006-07 school year.

65. Ms. E.F. observed that *Student* did not at all times tolerate well the “pull-outs” from the cluster class to classes for PE, art, music, and drama at O., and that *Student* would be subjected to the same or similar over stimulation at JFMS practically at all times should she be placed there.

66. In March 2004, school officials, including Ms. E.F. completed an Occupational Therapy Reevaluation for *Student*. At that time, *Student* was demonstrating skills similar to those described by Ms. E.F. in her testimony in this hearing.

67. Ms. E.F. testified that she considered JFMS and Conover as possible placements for *Student* and relied upon her prior experience working with students and spending time at these schools as well as at O.. Ms. E.F. concluded that Conover would be the appropriate placement for *Student*. She believes that *Student* would be unhappy and more limited at JFMS because she would likely spend most of her time with the adult working with her and would have fewer opportunities for interacting with other students. She described that the middle school environment is more geared toward students getting from class to class, sitting at their desks and listening to teachers. At Conover, the environment is geared toward communication and impromptu hallway interactions are facilitated.

68. Ms. E.F. testified that the IEP team considered whether the JFMS classroom could be modified to implement *Student*’s IEP. The team considered physical modifications to the environment such as toys and equipment which could be brought in, but remained concerned about environmental considerations. The team considered adapting one small room in a middle school to an entire environment at Conover School where *Student* could be successful throughout the entire school and concluded that Conover would be the least restrictive environment.

69. Ms. L.R. has provided physical therapy (hereinafter “PT”) services for *Student* for all six years that *Student* has attended O. Elementary. Ms. L.R. holds a bachelors degree in physical therapy and completed further college coursework in special education. She is licensed by the state of North Carolina as a physical therapist. She has worked as a physical therapist for 33 years in a variety of settings including public school classrooms, separate schools, homes, residential facilities, and hospitals. Ms. L.R. has served as a clinical instructor of physical therapy at the university level. She also works with high school interns at Conover School who are interested in PT.

70. Ms. L.R. testified that *Student*’s motor skills are characterized by her spastic quadriplegia which means that she has abnormal tone in all extremities and low tone in her postural muscles. She can reach and use her arms while sitting, but has difficulty moving from sitting into standing because of the abnormal muscle tone. One of the things that is especially challenging for *Student* is that she does not use her hands to support her balance. *Student* uses a stander to allow her to be supported in upright positions and as a strategy to help her make transfers from her wheelchair. *Student* can take some steps using her gait trainer, but she is inconsistent with this. *Student* responds to mobility activities willingly if she is approached in a structured way. *Student* does not like to be moved if she does not know where she is going.

71. Ms. L.R. conducted a PT Reevaluation for *Student* in March 2004. The evaluation found

that *Student* continued to have increased muscle tone of all extremities and limitations in range of motion. *Student's* postural protective responses (head righting and trunk righting) responses were delayed and incomplete which was comparable to prior evaluations.

72. *Ms. L.R.* was a member of *Student's* IEP team and was involved in the development and implementation of *Student's* IEPs. *Student* worked on similar PT goals and objectives throughout the time that *Ms. L.R.* worked with her. PT goals and objectives included such tasks as walking within the classroom with minimal physical assistance; maintaining standing with external support; sitting with minimal support; and, reaching for toys and objects to encourage shoulder flexion and upper back extension. During the 2005-06 school year made progress in that she maintained her skills on these tasks. For the 2006-07 year, *Student* maintained skills at some times and at other times she was inconsistent in her ability to work through mobility activities.

73. *Ms. L.R.* observed that for *Student* maintaining is progress and that it is important for her to maintain and to not regress. She further observed that all people in *Student's* environment are important and that it is a matter of who is responding to *Student*, without regard to whether they are disabled peers or adults.

74. *Ms. L.R.* was involved in the IEP team decision regarding placement. *Ms. L.R.* opined that Conover was the appropriate placement for *Student* because it would meet her needs and goals. One factor in her decision was the expertise of the staff at Conover. Another factor was *Student's* age of 14 which requires the team to begin to consider *Student's* transition to adulthood and the amount of time remaining for the schools to provide her services. *Ms. L.R.* considered placement at JFMS, but did not think this placement would be appropriate including that it would be more limiting than expanding and supportive of *Student*. Finally, *Ms. L.R.* considered that the middle school environment does not lend itself to the changes or the pace that will be needed to support *Student*.

75. *Ms. T.S.* is a speech pathologist with the Catawba County Schools who worked with *Student* during the 2005-06 and the 2006-07 school years. *Ms. T.S.* holds a masters degree in communication disorders and is licensed by the state of North Carolina and the national organization for speech pathologists. *Ms. T.S.* previously worked as a teacher in a cluster classroom serving moderate to severely disabled students. *Ms. T.S.* has worked at *O.* and JFMS and is familiar with the program at Conover.

76. *Ms. T.S.* testified that *Student* has severely delayed speech and language skills and she is nonverbal. The primary focus of IEP goals and objectives for *Student* has been use of switches and signing. *Ms. T.S.* has not seen *Student* make much progress on speech and language goals in the past two years, although she has maintained some skills and that is considered progress for *Student*.

77. *Ms. T.S.* participated in the IEP team decision regarding placement for *Student*. *Ms. T.S.* considered Conover School to be the appropriate placement for *Student*. *Ms. T.S.* considered that elementary and middle school settings are different and that the students at JFMS are working at a much faster pace than *Student* and are working on completely different tasks academically.

Further, some of the activities that *Student* is working on, such as switches, can be loud and can set her apart in a middle school setting. *Ms. T.S.* also considered that *Student* will have access to specialized therapies at Conover and will have more opportunities to participate with peers who are working on similar activities.

78. *Ms. A.B.* is a teacher of the visually impaired who has worked with *Student* since 1998. *Ms. A.B.* has an undergraduate degree in therapeutic recreation, a master's degree in special correctional education and additional coursework in visual impairment. *Ms. A.B.* is licensed as a special education teacher in the area of cross-categorical and has worked with the Catawba County Schools for 17 years.

79. In March 2004, *Ms. A.B.* prepared a functional vision report for *Student*. For most of the assessment activities attempted, *Ms. A.B.* did not observe a visual response by *Student*. These activities included assessments of light perception and movement which also yielded no response. *Ms. A.B.* reviewed and utilized an additional functional vision assessment done by staff at the Governor Morehead School in Raleigh. For this assessment, *Student* demonstrated some response to visual stimuli in the lower part of her left peripheral field which was consistent with *Ms. A.B.*'s observations.

80. *Ms. A.B.* participated in the development and implementation of IEPs for *Student*. With regard to her visual impairment, the primary IEP goal was for *Student* to explore her environment including having her reach out, touch and explore items. *Ms. A.B.* worked on the same general goals and objectives for each of the past three school years. *Ms. A.B.* has not seen any progression in *Student*'s visual skills in the time she has worked with *Student*.

81. *Ms. A.B.* was involved in the IEP team decision regarding placement. *Ms. A.B.* opined that Conover was the appropriate placement for *Student* because the environment at Conover, including the credentials and collaborative work of the staff, will meet *Student*'s needs. *Ms. A.B.* based her opinion on her experience working at Conover and JFMS. *Ms. A.B.* concluded that JFMS would be problematic for *Student* in part because *Student* relies upon the familiarity of her environment and on auditory input to compensate for her visual impairment. Some areas of JFMS such as the cafeteria are loud and would be stressful for *Student*.

82. *Ms. J.W.* is employed with the Newton-Conover City Schools and is the principal of Conover School. *Ms. J.W.* has an undergraduate degree in special education and a master's degree in school administration. *Ms. J.W.* was a special education teacher for 14 years and then an educational diagnostician before becoming an administrator. She is licensed in special education and school administration.

83. *Ms. J.W.* was involved in the March 8, 2007 IEP and participated in the discussion of placement for *Student*. *Ms. J.W.* also reviewed *Student*'s IEP and concluded that Conover was the appropriate placement for *Student*. *Ms. J.W.* considered that *Student*'s IEP goals could be met at Conover and that *Student* would benefit from the expertise of the staff and the collaborative approach used at Conover.

84. Conover School is a public separate school for students with moderate to severe

disabilities. There are 16 classrooms from preschool to high school including two regular education preschool classes. There is a teacher and two teacher assistants in most of the classrooms. There is a full-time nurse, two speech pathologists, one speech assistant, and PTs and OTs.

85. The facilities at Conover School include sensory rooms where different equipment and materials are placed which allow the students to engage in various activities to address their individual sensory needs. There is also a large multipurpose room that is used for PT and OT when these therapies are not being done in the classrooms. Conover has a special instructional playground with specialized equipment for students with disabilities which were designed through the collaborative efforts of teachers and therapists.

86. Classes at Conover are arranged by grade level with no more than a three-grade range in each class. Each classroom has a daily schedule based upon the needs of the students in that class. Instruction at Conover is guided by the North Carolina Standard Course of Study Extensions, monthly school wide themes, and the IEPs of the students. *Students* rotate through classes in art, music and physical education. On Fridays, the entire school participates in Fun Friday which involves meetings of such groups as Girl Scouts and Special Olympics as well as grade level activities such as cooking or scavenger hunts.

87. Staff at Conover operates under a collaborative model where therapists and teachers plan together and coordinate their teaching and therapies. Staff holds regular meetings at which they develop planning maps used to plan the curriculum and IEP goals for each student around the school wide thematic units. In this way, an art activity for a student might involve the classroom teacher, teacher assistants, art teacher, PT, OT and speech therapist, each working with students during the activity.

88. Conover provides opportunities for interactions between disabled and non disabled students by having non disabled students come to Conover. For example, there is a group of high school athletes called the Maiden Buddies who come and work with the older students monthly. The Dream Team is a group of middle school athletes who work with Conover students and there is also a group of elementary students who come to Conover. The non disabled students are provided training before working at Conover including a discussion about disabilities and a tour of the school. These students are involved in different activities depending on the needs of the classroom including such things as assisting students in physical education. This approach is beneficial to the disabled and non disabled students.

89. *Ms. F.W.* is the Director for Exceptional Children for the Catawba County Schools and provides administrative oversight of all services for children with disabilities in the school system. *Ms. F.W.* holds a bachelor's degree elementary education and a master's degree in special education. Her prior work experience includes teaching regular education and special education. She also was a clinical instructor with the Division for Disorders of Development and Learning at UNC-Chapel Hill which trained college students, physicians, and therapists to work with children with disabilities. *Ms. F.W.* is licensed in the areas of elementary education, learning disabilities, and special education administration.

90. *Ms. F.W.* was a program specialist with the Catawba County Schools at the time *Student* entered kindergarten and has exercised oversight of services for *Student* including attending some IEP meetings.

91. *Ms. F.W.* participated in the March 2007 and the July 2007 IEP meetings for *Student* and was involved in the placement discussions at those meetings. *Ms. F.W.* considered JFMS as a possible placement for *Student*. She visited JFMS with the parents and was familiar with the school since her office used to be located there. She concluded that JFMS would not be an appropriate placement for *Student* because *Student's* world would get smaller. *Ms. F.W.* explained:

Student's world is pretty much that little box that's in front of her on her desk. And it's those people that move into her space and she allows them into her space that she can touch and who can interact with her. My feeling is that Conover School offers her a bigger world because her box can be expanded to include more opportunities for interaction, more opportunities for communication. At JFMS . . . I see her working mostly one-on-one with a teacher or a teacher assistant who is taking her from place to place and trying to address her goals in a very narrow world and a very limited world, limited space.

92. *Ms. F.W.* also considered the nature of the cluster class at JFMS. She testified that the students in the cluster class at JFMS are participating in extensions to the standard course of study and they are learning to read, write and do math calculations. These students also participate in other classes at the school. In this setting, *Student* would not have a peer group with which she could practice her skills to the extent that is appropriate for her. *Ms. F.W.* further stated that *Student* needs a different and slower pace than that at JFMS. "She needs the opportunity for her environment to respond to her needs, rather than her having to respond so much to the environment."

93. *Ms. F.W.* also considered whether *Student* would benefit from opportunities for interactions with non disabled peers at JFMS such as during class changes. *Ms. F.W.* testified that class changes are a busy time when hundreds of kids are pouring into the hallway, and it would not be an appropriate time for *Student* to be in the hallway. Further, yelling across and say "hi" to *Student* in the busy hallway would not be appropriate for *Student*, as her sensory issues would make that a very scary and uncomfortable place.

94. *Ms. F.W.* concluded that it would be extremely difficult for *Student* to address her IEP goals and objectives in the cluster classroom at JFMS. Further, Conover provides a trans-disciplinary approach and can provide opportunities for *Student* to access the services she needs to meet her IEP goals. Conover School also provides for structured interactions with non disabled peers who participate with the disabled students in the environment that is familiar to the disabled students.

95. Dr. Nancy Dominick testified as an expert for the Respondent in the area of special education. Dr. Dominick is the special education specialist for the UNC Center for School

Leadership Development where she trains administrators across the state in special education. Dr. Dominick recently served on the committee which wrote the North Carolina regulations, guiding practices and forms for use in serving students with special needs. Dr. Dominick holds a Ph.D. in clinical psychology. She also holds a master's degree in school psychology and an undergraduate degree in psychology and English. Dr. Dominick's prior work experience includes serving as Assistant Superintendent for Exceptional Children and *Student* Services for the Durham Public Schools where she oversaw programming for approximately 4,000 exceptional children. Dr. Dominick also served as Director for *Student* Services and Exceptional Children's Services in Davie County Schools. She was a visiting assistant professor at Wake Forest University and Director of Psychology and Special Education at Greensboro College. Dr. Dominick is licensed as an English teacher, special education teacher, special education director, school psychologist, and curriculum instruction specialist.

96. Dr. Dominick reviewed background and history information about *Student* as well as her IEPs, meeting notes and related documentation. She also visited *O.*, Conover and JFMS. *Student* was absent when Dr. Dominick visited *O.* so she did not observe *Student*. Dr. Dominick did meet with the teacher, principal and assistant principal and viewed photographs and video of *Student*.

97. Dr. Dominick opined that Conover is the appropriate placement for *Student*. She stated that *Student* has received an impressive array of services over the years, yet she has made very slow progress. *Student* also is working on goals that are very similar to goals she had several years ago. At this point, the focus is on improving *Student*'s communication skills so that she can make her needs known and improving her mobility skills as much as possible so that she can interact with other people. The program at Conover would allow the most focus on these activities for her.

98. Dr. Dominick considered the nature of the program at JFMS and noted that students in the cluster class there are preparing for the occupational course of study in high school. They were working on reading, language, and science experiments. They attended a regular education computer science class and appeared to be doing the same work as the non disabled students. It appeared that this is a fairly rigorous academically focused class.

99. Dr. Dominick found that, by comparison to the work of the students at JFMS, *Student* is working on pre symbolic activities. For example, *Student* is still working with switches to be able to make her needs known and to control things in her environment. *Student* is working on basic self-help skills where the JFMS students are on a high school diploma track. Dr. Dominick found that the program and services at Conover School are more similar to the program and services that *Student* has experienced at *O.*. At Conover there was a focus on communication skills and self-help skills. Dr. Dominick opined that if *Student* were at JFMS, she would be working on a different curriculum than the other students in the cluster classroom. That is, placing *Student* in that class would not simply be a matter of providing supplemental aids and services, it would involve providing a curriculum different from the other students in the class.

100. Dr. Dominick considered the opportunities for *Student* to interact with non disabled peers at JFMS. She noted that there did not appear to be many opportunities for such interaction because students were very focused in their classrooms and had limited time and opportunity to

interact during class changes. Also, places like the cafeteria were loud and busy and would not be conducive to appropriate interactions for *Student*. At Conover, non disabled peers come to the school and work with the disabled students so that interactions are more conscientiously built in to the program.

101. Dr. Dominick opined that one important aspect of peer interactions is the disabled student's ability to participate in the interactions. The importance of this factor in the overall consideration of placement varies depending on the age and particular disabilities of the child. By middle school and high school, the focus is on ensuring that the students have the skills to move out of school and away from that protected environment. While one wants interaction and socialization, what is really desired is to be sure that every door that can possibly be opened for the student is opened, and this takes priority over socialization.

102. *Father* stated that placing *Student* in JFMS could be looked upon as an experiment, which is what had been done in placing *Student* at *O.*, and that if it failed, they would know immediately and make corrections. It is clear that such an "experiment" should not be undertaken and that there is a very real potential for *Student* to regress in that setting, and that it would be very difficult to restore the minimal progress that she has made so far should she regress. For *Student*, "maintaining" is progress in most areas and it is important to keep her at the levels of current functioning to the extent possible. The risk of regression if placed at JFMS is not warranted.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., and implementing regulations, 34 C.F.R. Part 300.

2. *Student* is a child with a disability pursuant to N.C. Gen. Stat. § 115C-106.3 and is entitled to receive a free appropriate public education ("FAPE") pursuant to the IDEA, 20 U.S.C. § 1412(a)(1); 34 C.F.R. 300.121, and the North Carolina General Statutes and the North Carolina Procedures Governing Programs and Services for Children with Disabilities.

3. In order to determine whether a student has been provided a FAPE, it must be determined whether there has been compliance with the procedures set forth in the IDEA and whether the individualized educational program ("IEP") developed through those procedures is reasonably calculated to enable the child to receive educational benefits. Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 206 (1982). Further, in North Carolina, the IEP must ensure that the child has an opportunity to reach his or her full potential. Burke County Bd. of Educ. v. Denton, 895 F.2d. 973, 983 (4th Cir. 1990).

4. Petitioner has the burden of proof in this case. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed. 2d 387 (2005). Petitioners must therefore prove, by a preponderance of the evidence, that *Student* can be educated in the appropriate classroom setting that is the least restrictive, and petitioner contends herein that should be the separate classroom at JFMS. 20

U.S.C. § 1415(i)(2)(C)(iii).

5. In determining the educational placement of a child with a disability, the Respondent must ensure that the placement is in the least restrictive environment ("LRE"). That is, to the maximum extent appropriate, children with disabilities must be educated with children who are non disabled. Further, "special classes, separate schooling, or other removal of children with disabilities from the regular education [should] occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. 300.114.

6. Under the LRE requirements of the IDEA, the placement must be (1) determined at least annually; (2) based on the child's IEP; and (3) as close as possible to the child's home. In selecting the LRE, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 C.F.R. 300.116.

7. The Petitioners have placed emphasis on the least restrictive environment and the necessity for interaction between *Student* and non-disabled peers. In the Fourth Circuit, a three-pronged inquiry is used to determine whether mainstreaming, or educating a child with her non-disabled peers, is required. This inquiry was first enunciated in DeVries v. Fairfax County Sch. Bd., 882 F.2d 876 (4th Cir. 1989). The inquiry was most recently applied in Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997).

8. The Court in DeVries held that "mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or (3) the disabled child is a disruptive force in a regular classroom setting." Hartmann at 1001 (citing DeVries at 879).

9. Although it is possible that *Student* would receive educational benefit at JFMS, it is clear that it is more likely that *Student* will regress at JFMS and not receive educational benefit and any potential for benefit would be completely out-weighted.

10. Any benefits that *Student* could obtain at JFMS would be marginal at best, and it is clear that the educational benefits to be obtained in the separate public school setting at Conover significantly outweigh any benefit at JFMS.

11. Although there is some evidence that *Student* would be disruptive in the separate classroom setting at JFMS, it is not necessary to consider that factor based on conclusions of law numbered 7 and 8 above.

12. *Student* is entitled to the preparation and implementation of an Individualized Education Program ("IEP") as defined in G.S. 115C-106.3(8) and 20 U.S.C. § 1414(d) as a consequence of being identified as a child with a disability.

13. Placement decisions are to be made on the basis of the individual student's educational needs as stated in the IEP. The principal determinants in selecting the program or service for each child shall be goals of the child's IEP. 16 N.C.A.C..1510C.

14. In this case, *Student* is a severely disabled student with significant educational needs. Her IEP describes severely delayed skills and her need to work on very basic skills in communication, exploring her environment, tolerating sensory input, and mobility activities. *Student* has been working on these skills for a number of years and has made very slow progress in resource and separate classroom placements. The evidence shows that the nature and severity of *Student*'s disability is such that she can not be satisfactorily educated in the regular classroom even with the use of supplementary aids and services.

15. The evidence also shows that *Student*'s needs and goals are more aligned with the programming provided in the proposed public separate placement at Conover School. Further, although *Student* should have opportunities for interactions with non disabled peers, the evidence shows that she has experienced minimal benefit from these interactions in the past and, as she moves to the middle school environment, the placement at Conover School will provide appropriate structured opportunities for such interactions.

16. The 2007-08 IEP developed by Respondent for *Student* which includes placement in a public separate school is reasonably calculated to enable her to receive educational benefit and that it will give her an opportunity to reach her full potential. Rowley, 458 U.S. 176; Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 983. In developing the IEP for *Student*, Respondent fully and appropriately considered all possible placements on the continuum, including JFMS and Conover.

17. In developing the IEP for *Student* and making the decision for placement, convenience for Respondent was not a significant or determining factor. In fact, it seems that convenience for the Petitioners is more of a factor because of the proximity of JFMS to their home.

18. The Petitioner has failed to satisfy her burden of establishing, by a preponderance of the evidence, that Respondent denied *Student* a FAPE through the 2007-08 IEP which proposes a placement in a separate classroom.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

The Undersigned finds that Petitioners have failed in their burden of proof regarding substantial error by Respondent that would deny a free appropriate public education to *Student*. The Respondent acted lawfully and consistent with the Individuals with Disabilities Education Act through the 2007-08 IEP which provides for placement in a separate classroom. Respondent's IEP and placement of *Student* was appropriate to address her special needs so as to provide her with FAPE in the least restrictive educational environment.

NOTICE

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 et seq.) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing)... may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices." The State Board, through the Exceptional Children Division, shall appoint a Review Officer who shall conduct an impartial review of the findings and decision appealed.

Inquiries regarding further requirements of appeal rights, notices and time lines, should be directed to the Exceptional Children's Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

THIS IS A FINAL DECISION.

IT IS SO ORDERED.

This the _____ day of January, 2008.

Honorable Donald Overby
Administrative Law Judge